

## **Montana Transportation Commission**

**August 11, 2004 meeting**

*Thee Garage~ 19 W Montana Avenue, Baker MT*

### **In attendance:**

Shiell Anderson, Transportation Commission Chair  
Nancy Espy, Transportation Commission Vice Chair  
Kevin Howlett, Transportation Commissioner  
Meredith Reiter, Transportation Commissioner  
Dan Rice, Transportation Commissioner  
Dave Galt, Director –Montana Department of  
Transportation (MDT)  
Jim Currie, MDT Deputy Director  
Tim Reardon, MDT Chief Counsel  
Sandra Straehl, MDT Rail, Transit & Planning  
Administrator

Joel Marshik, MDT Chief Engineer  
Mike Duman, Assistant FHWA Division Administrator  
Mark Wissinger, MDT Construction Engineer;  
Loran Frazier, MDT Missoula District Administrator  
Ray Mengel, MDT Glendive District Administrator  
Russ McDonald, MDT Human Resources Administrator  
Vicky Koch, MDT Civil Rights Bureau Chief  
Steve Garrison, MDT Staff Attorney  
Sarah Bond, Assistant Attorney General/Department of  
Justice Civil Services Bureau.

*Please note:* the complete recorded minutes are available for review on the commission's website at [http://www.mdt.state.mt.us/trans\\_comm/](http://www.mdt.state.mt.us/trans_comm/). You may request a compact disc (containing the audio files, agenda, and minutes) from the transportation secretary at (406) 444-7200 or [ldemont@state.mt.us](mailto:ldemont@state.mt.us). Alternative accessible formats of this document will be provided upon request. For additional information, please call (406) 444-7200. The TTY number is (406) 444-7696 or 1-800-335-7592.

Chairman Anderson called the meeting to order at 8:03 am.

### **Agenda item 1: Railroad Crossing – Willow Creek**

This project will replace the concrete surface railroad crossing on Secondary 287 east of Willow Creek at milepost 4.408. MDT will pay for materials (estimated at \$26,400 – to be funded with Surface Transportation Program Secondary funds) and Montana Rail Link will pay for the labor.

Commissioner Rice moved to accept staff recommendations to approve the addition of this project to the construction program; Commissioner Espy seconded the motion. All five commissioners voted aye.

### **Agenda item 2: Bridge decks – Helena**

Commissioner Rice moved to approve the addition of two bridge deck preservation projects in Helena (North Main Street at RP 0.77 over the Montana Rail Link tracks and Cedar Street at RP 1.82 over Interstate 15) to the program using approximately \$57,000 in Congestion Mitigation and Air Quality funds. Commissioner Reiter seconded the motion. All five commissioners voted aye.

### **Agenda item 3: Dupuyer-SE design-build pilot project**

The 2003 legislature authorized a six-year, \$20 million pilot program for a design-build contracting pilot program. We selected three different types of projects: a facility (Wibaux weigh station, awarded last week), a bridge (safety improvements to the Lincoln road interchange on Interstate 15 north of Helena), and a reconstruction job (the Dupuyer-SE project). The Dupuyer project contains both a bridge and reconstruction, and the EIS was just completed so it's fresh, so we think it's a good choice for design-build.

Commissioner Rice asked if we're on track to complete these three projects within the six-year span provided by the legislature. Straehl and Galt confirmed that we are. Marshik explained that design-build is a speed tool not a cost-savings tool. The process requires that we have the environmental work done, and enough design and alignment

information to define the footprint design so that we can purchase right-of-way, before the project is ready to be moved into the hands of a design-build team.

Commissioner Howlett moved to approve the allocation of \$550,000 for MDT preliminary engineering costs with the intent to advance this project to the right-of-way purchase phase; Commissioner Espy seconded the motion. All five commissioners voted aye.

#### **Agenda item 4: Update on reauthorization and appropriations issues**

Currie explained that right now nothing is really going on. There were some serious attempts a couple of weeks ago during a congressional conference committee, but nothing was resolved. There will be an attempt to get a bill passed in September, but realistically it probably won't happen until next year.

We have been operating under five continuing resolutions since the expiration of TEA-21. We receive our money in twelve payments during the year. Currie distributed two handouts, one a summary page from the *Tentative Construction Plan*, and the other entitled *Projected Federal Program Status based on \$283.2 million*.

The federal fiscal year 2004 obligation limitation was projected at \$283,287,897. Due to a bill drafting error, the amount allocated to earmarked projects (usually with their own obligation authority) came off the top of our federal funding, to the tune of about \$10 million. \$8 million for the Going-to-the-Sun Road was returned in the form of the Department of Defense legislation line item. Those earmarked projects, which didn't come with their own authority, essentially replaced \$10 million worth of other projects the commission approved for fiscal year 04. Currie later explained the projects were still put through, but the \$10 million had to be absorbed by advanced construct which will affect next year's construction program. Galt said this will impact our preconstruction efforts next year and referred to a letter he wrote to the Consulting Engineering Council of Montana to let them know this was happening.

Currie said we have used advanced construction to keep our lettings going. Advanced construction is a mechanism we can use to let a project before the federal obligation authority is available, using state dollars. When the federal obligation authority is available, we can turn that around and get reimbursed for it. We don't like to use this in Montana because we look at it as mortgaging the future, but a lot of other states use it extensively.

We are using a little over \$29 million in advanced construction. We have a balance of about negative \$20 million and there are still expenses to be incurred this year: the September lettings, preliminary engineering costs, right-of-way costs, CTEP costs and incidental construction costs. Instead of receiving \$295 million in obligation authority, we ended up with about \$268 million. We recently learned that funding for the last week of the federal fiscal year has been held back, which translates to a loss of about \$17 million of congressional obligation authority for us. In combination with us front-loading the program – a goal we've been working towards for some time: letting more projects in the winter/spring rather than in the summer – we didn't end up with a lot of room to react to this. For these reasons, the director and I decided to move projects out of the September and November lettings.

So what does this mean for next year? For 2005 we had anticipated a funding level of \$304 million; I don't know what the funding level will be. It also means the commission will have some decisions to make at this year's "Red Book" [Tentative Construction Program] meeting. One decision will be what funding level to use as an assumption. Another will be what to do for 2009, which will be added to our planning horizon this year. Third, what do we want to do with the issue of advance construct?

Commissioner Rice said he heard from Senator Baucus' group that we may realistically expect a bill around Easter 2005. He suggested that we consider having several different funding assumptions, including a "hoped for" amount but also a "worst case scenario" amount. Galt said we will do that. Currie explained that the Tentative Construction

Program (TCP) is a list of prioritized projects in each district. The funding level will determine how deep we go into the list of priorities.

Commissioner Howlett expressed a desire to enter into a dialogue with affected communities to let them know that Congress has reordered our priorities for us. => Galt said that is a good idea and suggested waiting until the Red Book process is complete.

Commissioner Espy asked about the Section 402 transfer because Montana doesn't have an open container law. Galt said the next federal transportation bill is likely to contain hard sanctions, and that he was very optimistic that an open container law would therefore be passed during the 2005 legislative session.

Straehl explained that under continuing resolutions, our funding level can actually decline if the revenues in the Trust Fund are declining.

### **Agenda item 5: 2005 – Proposed highway projects**

Straehl explained that we could not use the Program/Project Management System (PPMS) to generate a Statewide Transportation Improvement Program (STIP) this year. The STIP is the mechanism by which we notify the public of new projects entering the program and what the state intends to spend money on in terms of different phases of project development for the year. We have to resolve the technical issues by this fall, but we do not have the solution in hand. There is a lot of project history to research first. In the meantime, we would propose to do a STIP amendment to show which projects are moving into the preliminary engineering phase.

Last year on October 7, the commission made decisions regarding funding mixes and project types based on the performance programming process results (P<sup>3</sup>). Those showed a dearth of rehabilitation projects. This list of projects contains the mix of project types approved by the commission, including rehabilitation projects.

Commissioner Howlett asked if the list included projects on any of Montana's reservations. Straehl said she has not traditionally broken projects down in that way but would be glad to do that. She confirmed that we do monitor the distribution of funds between reservation and non-reservation areas. She referred to information regarding Federal-aid dollars spent per road mile on and off the reservations as well as Federal-aid dollars spent per capita on and off the reservations. This information shows there is equity.

=> Chairman Anderson asked if Sandy could bring this information to the next meeting. Commissioner Howlett said he would like to see that.

Straehl pointed out that if the commission defers this decision to a later meeting, her staff would not be able to have ready dates for the projects listed in time for this year's TCP discussions.

Galt explained that the current TCP doesn't have a project mix that reflects the commission's October 7, 2003 decisions. Approving this project list may seem counter-intuitive: some projects will have to slide from 2005, so why would we recommend adding projects for 2009? The reason is the TCP is overmixed on reconstruction projects, and we need to get these rehab projects in to get the proper mix. Doing so will ensure the system performs to the desired level; if not, we will start to see system degradation.

Commissioner Espy moved to accept staff recommendations to approve the addition of the project list to the program, as well as \$2.2 million in partial preliminary engineering through this STIP amendment; Commissioner Reiter seconded the motion. All five commissioners voted aye. Commissioner Espy said we need to move forward and continue to plan despite the unknowns; we will adjust once funding levels become known.

### **Agenda item 6: System improvements related to access for private development**

Commissioner Espy moved to accept staff recommendations to approve the developer-funded installation of left turn bays on Secondary 279 at the approach to the Silvercreek commercial subdivision north of Helena, and on Montana 40 at the access to the Riverside at Whitefish development southeast of Whitefish, and delegated its authority to allow the developers to let projects, pending concurrence by MDT's chief engineer; Commissioner Howlett seconded the motion. All five commissioners voted aye.

### **Agenda item 7: Big Sky Trail – Montana Highway 64**

Gallatin county will sponsor this trail and accept responsibility for the long-term maintenance.

Commissioner Howlett moved to accept staff recommendation to approve the Big Sky Community Corporation's request to place a bicycle/pedestrian trail within Montana Highway 64 right-of-way and delegate its authority to allow the Big Sky Community Corp. to let the project, pending concurrence by MDT's chief engineer and the execution of an acceptable agreement among all parties; Commissioner Espy seconded the motion. All five commissioners voted aye.

### **Agenda item 8: Off-system construction project using CMAQ funding in Missoula County**

The Kelly Island walkway is west of Reserve Street and will help get school children between the school and the park. The city has a detailed plan for bike and pedestrian trails, and this is part of it.

Commissioner Howlett moved to accept staff's recommendations to delegate its authority to lead, award, and administer the contract for the Kelly Island walkway bicycle/pedestrian project to Missoula County with two contingencies:

- ?? a bid amount and construction engineering costs within the maximum funding cap of \$173,160 (federal) plus \$25,480 (local match) per the state/local agreement, and
- ?? concurrence of MDT's chief engineer.

Commissioner Rice seconded the motion. All five commissioners voted aye.

### **Agenda item 9: Construction projects on the Urban Highway System**

Commissioner Howlett asked if any of the public process is left out if we delegate authority to a local government to let a project. Straehl said she couldn't say with a hundred percent clarity given the variances in the public involvement processes used by local governments.

Commissioner Rice moved to accept staff's recommendations to approve the projects (Kagy Blvd. (U 1212) from 475<sup>th</sup>E of 19<sup>th</sup> Ave to 11<sup>th</sup> Avenue in Bozeman; South Avenue (U-8120) from Clark St. to Grant St. in Missoula; and Clements (U8101) from South Avenue to 7<sup>th</sup> in Missoula) and delegate authority to let, award, and administer the contract for these projects to the city of Bozeman, the city of Missoula and Missoula County pending concurrence of MDT's chief engineer; Commissioner Reiter seconded the motion. All five commissioners voted aye.

### **Agenda item 10: Amend access control resolution**

#### **NH 5-3(60) 109 – Kalispell Bypass**

Frazier explained that we started reviving this project this year and are working to get up to speed on what has transpired since 1996. We received earmark funding to move forward with active right-of-way acquisition for a Kalispell bypass – up until now, we have been passively acquiring right-of-way. We have now purchased the railroad, which was a large portion of the right-of-way needed: approximately 40 percent. The original access control resolution doesn't reflect the approaches and accesses that were included in the EIS and ROD [FHWA's record of decision]. The essential purpose of the access control resolution

is to ensure that the bypass is able to function as such, rather than developing into another downtown Kalispell. We had about 150 people at the first public meeting to talk about design and have another meeting scheduled for August 24, and another in the fall. We will have a fairly active public involvement process in developing the plans for this project.

The city of Kalispell and the county commissioners are in support of amending the access control resolution as proposed. Frazier referenced the letter from Montana Forest Products/O'Neill Family Partnership in opposition to the amended resolution and said we are actively working with them to find solutions.

Commissioner Rice asked if we adopt the resolution if that precludes MDT from dealing with this particular problem with the O'Neill group. Reardon clarified that the request today amounts to approving a preliminary access control resolution to allow design to go forward showing no access other than public road access. If, during the negotiation process with landowners, access is an issue, we will probably have to go back to the designers and determine if access is appropriate. The intent is to *not* grant private or commercial access to this facility except through public roads. If that damages property, property owners may be able to seek damages. Plans for a bypass make certain properties extremely desirable for development and developers would prefer direct access onto the road. The idea here is to get ahead of the curve.

Commissioner Howlett moved to accept staff's recommendations to approve the access control resolution; Commissioner Espy seconded the motion. Four commissioners voted aye; Commissioner Rice opposed.

### **Agenda item 11: special speed zones**

Marshik presented the results of four speed studies:

#### *Secondary 503 – Foy's Lake Road (near Kalispell)*

- ?? Speed limit of 50 mph from the intersection with Valley Drive south to local road #615 (approx 3.8 miles)
- ?? Within that zone, post a speed limit of 35 mph from milepost 2.2 to 3.8 (approx. 1.6 miles) during June, July and August
- ?? Flathead County will make the sign changes and has committed to having their sheriff enforce the change of speed limit during the three summer months when Foy's Lake is used for recreation.
- ?? This approach has not been used elsewhere in the state that anyone was aware of. Commissioner Howlett commented that this could be precedent-setting. Chairman Anderson said it would be helpful to get a report back in a year on how it worked since this amounts to a speed zone pilot project.

#### *Urban route 1202 – Oak Street in Bozeman*

- ?? 45 mph speed limit from the intersection with North 19th Ave continuing east to station 27+00 (100' west of the intersection with North 11th Ave), approximately 2,700 feet
- ?? 35 mph speed limit beginning at station 27+00 and continuing east to the intersection with North 7th Avenue (approximately 4,200 feet)

#### *Secondary 529 – Chinook West*

- ?? 45 mph speed limit from the intersection with Secondary 240 continuing west to station 500+00, Project S 430 (3), approximately 1,700 feet

#### *Secondary 240 – Chinook South*

- ?? 45 mph speed limit beginning at station 50+00, Project S 311 (2) continuing south to station 69+00 (200 feet south of the Milk River Bridge), an approximate distance of 1,900 feet
- ?? 55 mph speed limit beginning at station 69+00, Project S 311 (2) continuing south to station 150+00 (550 feet south of the landfill access), an approximate distance of 4,650 feet

Commissioner Rice moved to accept staff recommendations (summarized above); Commissioner Espy seconded the motion. => Commissioner Howlett amended the motion to require a report in a year on how the Foys Lake speed limit is functioning; Commissioner Espy seconded All five commissioners voted aye.

### **Agenda item 15: letting lists**

Marshik said yesterday we were alerted to a large crack in a Bozeman bridge beam. Staff will put an emergency project together and we are requesting authority to let that to contract that as soon as possible.

The lettings are estimated for \$6 million in August, \$13 million in September, \$28 million in November, \$40 in December, and \$60 million for January 2005.

Commissioner Howlett moved to accept staff's recommendations to approve the letting lists and to grant authority to the chief engineer to award a project to repair the damaged bridge in Bozeman; Commissioner Reiter seconded the motion. All five commissioners voted aye.

### **Agenda item 16: Certificates of Completion**

Marshik said there are a lot of projects outside the six-month window for completion. Staff turnover and missing payrolls account for the majority of the problems.

Commissioner Reiter moved to accept staff's recommendations to approve the certificates of completion for April, May and June of 2004; Commissioner Rice seconded the motion. All five commissioners voted aye.

### **Agenda item 18: Liquidated damages**

Four liquidated damages were presented.

\$2,284 assessed on SFCP 6-1(93)69 *Weeksville East* (Riverside Contracting, Inc.)

\$33,118 assessed on NH 8-2(60)43 *Last Chance Gulch to Prospect Ave* (Helena Sand & Gravel)

\$34,925 assessed on STPP 2-1(38)3 *Main Street – Miles City* (Century Companies, Inc.)

\$25,124 assessed on NH-STPE 22-2(19)41 *Plentywood – East & West* (Century Companies, Inc.)

No one was present to request a waiver for the commission. No action was taken therefore the liquidated damages stand.

### **Agenda item 19: Contract award**

CM 7406(5) *Chinook To K St - Livingston*

CM 7410(2) *Geyser-Park To F St-Livingston*

Currie explained that this project on the urban system was to be paid for with MACI funds. There was a set amount of funding on this project, so we didn't have a lot of flexibility to go over the available funding. The low bid, although within our guidelines for award, was about \$200,000 over the available funding. We approached the city of Livingston to see if they would be interested in augmenting the amount with their urban funds. They chose not to do that. The department recommends not awarding the project.

This also raises the issue of the policy that Director Galt and the commission have developed to address bids that are non-responsive or outside the guidelines for award (management memo 02-01). => Where funding limitations are strict, there is no point in the contractor meeting with MDT staff and the commission, so we need to adjust that policy.

Currie said in these cases, we would like to structure the contracts such that we have the ability to add or drop features so the project fits within the funding available.

Commissioner Espy moved to take staff's recommendation to withdraw the project given the lack of funds and have it rebid with alternative additives, and also to include language in the bids that addresses funding constraints; Commissioner Reiter seconded the motion. All five commissioners voted aye.

### **Agenda item 13: Shiloh Road Corridor – Billings**

Bruce Barrett, Billings District Administrator, introduced Vern Heisler, Billings city engineer/assistant public works director and Scott Walker, city/county planner.

Barrett provided some background on the Shiloh Road project. Shiloh Road is an urban route eligible for Federal-aid funding. It is priority two in the community's local transportation plan (Airport Road is priority number one). When we started this project, we wanted to reconstruct Shiloh from the intersection with Zoo Drive to Rimrock Road. The city was developing a project from Grand to Rimrock (approximately a mile); and we would do Zoo Drive to Grand.

The city has developed their project and intended to use an SID to fund it. However, there has been a lot of public outcry regarding the use of SIDs for arterial streets. With approval of landowners, the city council finally approved an SID from Poly to Rimrock, which is the last quarter of a mile of the corridor.

With us developing a project from Zoo Drive to Grand Avenue, there is the intervening  $\frac{3}{4}$  of a mile that has the potential to be left undeveloped unless we add it to our project. If we add it in now, it will require us to do a little more work on the environmental document but it won't require us to redo anything. If we wait, it might require us to go back and redo some of what's already been done. So that is the purpose for this request: to add  $\frac{3}{4}$  mile to the project.

Vern Heisler, Billings city engineer and deputy public works director, said the city had every intention of building the project between Grand and Rimrock. However, the SID process became "exciting" at best. The city is now working towards a citywide SID for arterial roads. If that passes, the city would be able to put up some funding to help leverage some of the MDT funding and get that last  $\frac{3}{4}$  mile done. Shiloh Road is a critical part of our system and we want to get it done. There will also be private contributions from a subdivision development up there. So, there is some funding in place and potential for more funding in the future.

Barrett said we will have to phase this project because of the cost involved. This  $\frac{3}{4}$  mile would be part of phase two, so approving it wouldn't delay phase one.

Bill Kennedy, Yellowstone county commissioner, added the west area of Billings is growing rapidly following the installation of the Shiloh Road interchange, and they really need the help.

Scott Walker, city/county planner, identified this as the city's second priority, with the top priority being Airport Road. Approving the addition of this  $\frac{3}{4}$  mile segment will help move the project ahead and hopefully allow the work to be done sooner.

Commissioner Howlett asked if the commission approves this if there will be the sense that developers don't have to come up with a portion of the funding? In one city, we've asked the local government to look creatively at bonding authority to assist with funding urban projects, and in another city, developers are bearing the cost of improvements since they are the ones that will primarily benefit from the improvements. Could we look at a more comprehensive approach, including a funding partnership?

Barrett said the city has every desire to come up with additional funding. It is not like we're starting a new project; due to circumstances beyond everyone's control, we are looking at  $\frac{3}{4}$  miles that will be undeveloped. St. Vincents has bought about 38 acres around King Avenue, and they are willing to work with us on right-of-way and the development of a major drainage ditch to deal with hydraulics issues. I think the city will obtain as much as

they can from the development along this corridor, and I think the citywide SID will provide some funding as well. Senator Burns was able to obtain \$15 million of stand-alone funding for Airport Road, the community's number one priority, so it doesn't appear to be a financial concern.

Commissioner Rice expressed a concern that extending a project late in the game, could impact other projects in the program.

Commissioner Reiter asked for clarification on the timeframe. The city portion of the project (Poly to Rimrock) will start this fall and be completed in the spring. Barrett said that, because of the limitations of the urban funding allocated to Billings, we will have to split the project anyway, no matter what. This will not affect urban projects in other urban areas in the state.

Straehl added that the Urban Program is a cost-constrained program at the urban level; any borrowing against the urban program is in accordance with the commission policy. Staff supports doing this because it allows the corridor to be developed as a cohesive unit, rather than the street having "neck-ins" and "bow outs". Local governments have found that partnering with other entities, such as private developers, allows for a shorter timeline for development. Relying only on urban funding means projects take longer to develop.

=> Commissioner Howlett – I would like a report from Dave on the issue of bonding in Kalispell since that was one option that we've been looking at for supplementing urban funds in other areas.

Commissioner Rice moved to accept staff's recommendations to approve the additional scope and funds for the Shiloh Road Corridor (STPU 1031(2) in Billings); Commissioner Reiter seconded the motion. All five commissioners voted aye.

### **Agenda item 12: Proposed Billings urban system action change**

Vern Heisler, Scott Walker, and Bill Kennedy all stood in support of adding Bench Boulevard from Lake Elmo Drive to Main Street to the urban system. It would alleviate congestion on Main Street, especially in relation to Metra Park. There is no more room to widen Main Street.

Barrett added that Main Street is on the National Highway System and carries an ADT of about 48,000 – it's the highest traffic volume primary road in the state. Bench Boulevard, even if placed on the urban system, will continue to be maintained by the city.

This wouldn't affect any other urban area in the state because the urban funds are distributed per capita. It wouldn't change the current priorities. However, it does allow us to look to the urban funds as a funding source for improving this road. It will spread the urban funds over more roads.

Commissioner Reiter moved to accept staff's recommendations to approve the addition of Bench Boulevard to the Urban Highway System; Commissioner Espy seconded the motion. All five commissioners voted aye.

### **Agenda item 14: Morning Star Drive project – Northern Cheyenne Reservation**

Galt said there was more background information when this item was placed on the February 2004 agenda. This project is funded with MACI money. It on a road that is off the Montana state highway system, in the town of Lame Deer. The project has an 86 percent federal/14 percent local match project funding ratio. The project was developed by the department and we were asked if we would transfer funds to the BIA to construct the project.

I got involved in this about September 2003. My concerns were three-fold: whether or not the Federal Highway Administration would accept the Bureau of Indian Affairs'



specifications, that the project should be competitively bid given the taxpayer dollars involved, and what liability the state would bear if there was a failure on the project. The first and last concerns have been alleviated and the last one to be addressed is the issue of competitive bids. I believe it should be competitively bid, and the commission is the correct body to appeal that decision to.

Carrie Braine, transportation planner and TERO director for the Northern Cheyenne. She said the tribe had not requested to come before the commission, and accepted statements of apology from Director Galt. Braine clarified that the project is 100 percent federally funded – the match is in federal funds. She said there are no state tax dollars associated with this project. The unemployment rate on the Northern Cheyenne (NC) ranges from 70-80 percent year-round. The NC would prefer to have the project built by force account through the BIA; their force account crew is 100 percent native American. Braine believes a competitive bid method would result in a higher cost to the state; with force account, there would be no mobilization costs, no profit to be made, and no TERO fees.

Cordell Ringel, consultant to the Montana-Wyoming Tribal Leadership Council, added that the BIA is authorized by the federal government to do force account to address the unemployment issue. The BIA has been doing force account work for over 30 years. Although it may not be popular with the contractors, it is popular with the tribes.

Cary Hegreberg, executive director for the Montana Contractors' Association, endorsed the competitive bidding process on public construction projects. We believe free and open competition provides assurance of the greatest level of cost-effectiveness per tax dollar. We believe any sizeable project in the public sector beyond routine maintenance should be awarded through competitive bidding. Should the project be awarded via the competitive bidding process, there would be stipulations regarding tribal labor on the job. We have the same discussion with city and county governments, and the state and federal government. Many other federal agencies, including the US Forest Service, the Bureau of Land Management, US Army Corps of Engineers, USFWS, and the Air Force, finance projects with federal dollars. Regarding the issue of profiteering, there are contractors that go under every year; obviously they are not getting rich at the expense of the taxpayers.

Hal Fuglevand, representing Oftedal, a heavy highway project contractor, stood in support of Cary and the competitive bidding process. He said their livelihood depends on that process. He expressed concern about the precedent this would set on the reservation jobs. He does not want to lose the ability to bid on highway projects.

Commissioner Rice inquired as to the status of this project. Galt said the project is in limbo. It is designed and ready. We could transfer the money to the BIA and get it going. We need an MOU and a project-specific agreement (PSA) before the project could start. Time is ticking away on the MACI funds; if we don't resolve this soon, we will have to spend the money on another project.

Galt said that within the rules and congressional action that allows the transfer of funds, it still leaves the state with the ability to put conditions on the transfer that it sees fit.

Straehl said there are different kinds of federal money. This money is allocated, appropriated and apportioned to the state of Montana. There is no language in the authorizing language of the Federal-aid highway program that speaks to force account. That may be in different authorizing language in 23 USC under a different program.

Commissioner Howlett asked if the parties who spoke are familiar with the Indian Self-Determination Act and its intent. This is the tip of an iceberg, so to speak. There are very specific requirements and opportunities that apply only to federally recognized tribes through this instrument. He expressed concern about fast-tracking the MOU and PSA given the heightened awareness around this particular project. He invited Mike Duman to speak to their [FHWA's] trust responsibilities to the Indian people.

Duman said Title 23 allows state highway agencies to advance their funds to federal agencies for building highway projects. FHWA's position is that once that transfer has taken place,

they are administered in accordance with the receiving agency's rules. The force account process is used in the Federal-aid highway program, typically in emergency situations. It may be used where it is in the best interests of the people. He expressed confidence in the protections in place to guarantee accountability of the funding transfer between the agencies.

Chairman Anderson asked if the BIA receives and administers other sources of funding used for road construction. Duman confirmed the BIA does receive Trust Fund monies via the IRR (Indian Reservation Roads) program. Generally, federal funds may not be used as the local match; IRR funds are the exception.

Commissioner Reiter asked if we have prior experience in transferring funds to the BIA and what the results were. Galt said he had experience with this early in his tenure with the road that feeds into Pryor Road. He believes the project has taken a significant amount of time. There was an allegation that the road was not built to specifications, which, upon investigation, were found to be untrue. There were, however, some significant paperwork errors and no environmental protections were afforded. Ringel responded that the project consisted of roughly 17 miles of a state secondary road at a cost of about \$20 million. The state provided \$4 million and BIA IRR funding covered the remaining \$16 million. The road was built in stages to correspond with how the funding was provided (annual allocation of \$4 million each year), hence the longer construction time in three different stages.

Commissioner Rice asked how an overrun would be handled. Duman said that would be spelled out in the agreement up front. Braine said there is an MOU already in place between the tribe and MDT. It specifies that overruns will be paid for by the tribe with IRR funds; any underrun would return funds to the state.

Commissioner Howlett expressed concern about the risk of the project not getting done. He said he didn't think this would be setting a precedent. This project needs to get done. Commissioner Howlett made a motion to transfer the funds for this project to the BIA so the project can proceed.

Chairman Anderson said he thinks there is a precedent-setting component to the motion that he's not comfortable with. He said if we start down this trail of allowing counties and tribes do this work by force account, I'm not comfortable making that policy decision here; that might need to be addressed by the legislature. He offered a substitute motion to start the process to get this project let to competitive bid; Commissioner Reiter seconded the motion.

Commissioner Reiter asked what would happen if we receive no bids, or bids way over the estimate. Galt reminded the group that this project comes out of a funding category that is fiscally constrained. This morning, the commission chose not to award the Livingston project because of inadequate funding. The difference here is the additional funding through the IRR and the BIA; perhaps the tribal agencies could offer to make up the difference, if that were needed. Commissioner Reiter asked if he could amend the substitute motion to allow the funding to be transferred to the BIA if there are no bids or the bid is over the engineers' estimate.

Strachl addressed the potential of the lapse in the money. With a continuation of the federal program, the monies will not lapse. We are not in lapse risk on the CMAQ [Congestion Mitigation and Air Quality] program.

Braine said the MOU between the state and the tribe specifies the tribe may withdraw from the project prior to a contract being signed, and they would do that. The MOU also allows the TERO director to set the percentage of tribal labor, and she would require 100 percent.

Commissioner Howlett suggested placing this on hold pending the general policy discussion.

The commissioners voted on the substitute motion offered by Chairman Anderson and seconded by Commissioner Reiter, with Commissioners Reiter, Anderson and Rice voting aye; and Commissioners Espy and Howlett opposing.

### **Agenda item 17: work/change orders**

Marshik said the work orders are fairly straight forward, but there is a large one: \$975,000 on the Four Corners project. He asked Mark Wissinger to explain the change order, which also serves as an administrative settlement with the contractor, in detail.

The project was awarded in June. The engineers' estimate was right at \$7 million; there were eight bidders on the project and the low bid was awarded to Riverside at \$6.6 million. They had an aggressive schedule to complete the project in one year, which is in part what allowed them to bid low. They filed a claim in June for \$1 million. Throughout the claim process, they claimed problems with our personnel and testing. There definitely were problems attributable to the soils, and we did learn from this experience. We now have one geotechnical engineer assigned to each district, and are doing much more thorough solid investigation during the preliminary phases of our projects. We are also starting to include the soils information in the plans, which achieves several things: one, it is made part of the contract; two, it also provides contractors as much information as we can; and three, it helps us realize where insufficient testing has taken place. We will also be using this information during our training sessions.

As a result, the project wasn't completed in one season and Riverside incurred some direct costs. Riverside has agreed to accept the change order settlement to cover additional costs incurred during excavation and embankment operations, additional paving costs, and legal and claim costs.

Commissioner Reiter moved to accept staff's recommendation to approve the work/change orders; Commissioner Espy seconded the motion. All five commissioners voted aye.

### **Agenda item 20: Commission discussion and public comment**

Commissioner Rice said we've brushed up against this issue for the last there years and haven't gotten to the core of it. Unfortunately, this morning we had a textbook illustration of what's not going right. I don't think it's valuable to try to place blame because that doesn't get us anywhere. We need to address and study – and do so relatively quickly – how MDT does business with the individual tribes in Montana. We have a number of tribes. There is a tendency to think about tribes as a single entity. I believe that's a fundamental mistake. They are individual, separate entities.

There are legal obligations imposed on this commission and we have certain charges... what we're responsible for. The tribes have a completely separate set of rights and goals. I think until we can get through some of the traditional misconceptions and develop a studied policy on how we're going to head in Montana, I think we are destined to repeat the unpleasant and candidly unfair results of this morning. In the long term, I don't think we have a good system in place. We have memorandums of understanding in place, but what are our obligations to create jobs? We need to define those and get everyone on board. We need a nice clear plan that addresses everyone's concerns to the extent we can. Most of all, we need something predictable rather than hit-and-miss. In addition to a plan, we need milestones of how and when we're going to get there.

Commissioner Howlett – I appreciate Commissioner Rice's observations about this morning. I think it's absolutely incumbent on us to recognize the Indian peoples of Montana are citizens of Montana. They also have a federal status and there are specific laws that apply uniquely to those nations. There is a lack of education and understanding about this. Building on what has been a proclamation of the last two governors of this state, I look at today not as the day we arrive, but the day we begin. There are oceans between the two entities, and we have a long way to go – mutually. The tribes may need to better understand the state and how it works, and the state needs to do a better job of reaching out and incorporating the Indian citizens into its mission as a state. I'm perplexed with trying to make decisions for the greater good. At times I feel like I'm dealing more with philosophical entrenchment than I am with fact. My responsibility here is to deal with fact, and the opportunities the facts make available. Highway bills are touted across the county as jobs bills. Do we include the reservations or do we defer that to the IRR program?

Given the political reality of a new governor and new commissioners, now is a good time to start building. I would recommend a subcommittee of the commission to begin to gather the facts. It's a good time to begin building something for the future. Let's think of this as a journey. I'm not ready to make a decision on policy. One reason is the people that would be impacted by the policy are not here. We need to work to reach out. That's not so hard. It's hard if we're unfamiliar with how to do it. The first thing we have to do is establish some trust. People need to be validated and know they will be treated as equals. Howlett cited recent work on the Gaming Commission and on the US 93 negotiations as positive examples.

Cary Hegreberg expressed the appreciation, on behalf of the MCA members, for the commission's willingness to address this issue. He said we are probably approaching an impasse that will be a lose-lose situation for all involved. I'm gratified to hear Commissioner Howlett's recommendation for a subcommittee taskforce and MCA would be happy to participate as a stakeholder. Recognizing we don't have the necessary understanding of tribal values, cultures and issues, we want to be part of the solution. We do tend to have a one-size-fits-all approach towards governmental entities. We have policy positions that our members adhere to. However, our contractors want to be able to do business on the reservations. We want to have productive, positive relations with tribal governments that result in good transportation systems that we're all proud of, and harmonious relationships in building projects. We can learn from the success stories and less-than-successful stories out there. Hegreberg offered his commitment and dedication toward the effort.

Shiell Anderson asked if there is a policy that suggests to the state that the federal money should be used to address tribal unemployment, or is our goal to address the needs and safety of the transportation system?

Garrison said it's far beyond the idea of a state or federal law. When we build a highway on a reservation, we are building a highway on a separate sovereign who has some say as to what goes on within its boundaries. These are normally projects in our right-of-way, but we are still building within the reservation. That sovereign, the tribe, may have its own ordinances and regulations, for example, construction projects within our boundaries must employ x number of tribal members. It's their inherent right to do what they can within their boundaries to maximize employment opportunities.

Chairman Anderson referred to the "rez factor" documented by Carrie Braine. Garrison said there are additional costs to doing business on the reservation, e.g. the TERO fee, and this is generally accepted. Those costs are passed along from the contractor to MDT. One of the common complaints regarding labor has been addressed in the MOU and allows contractors to access other labor pools within certain parameters.

Commissioner Howlett referred to the Indian Self-Determination Act and its ramifications. He addressed the concern about setting precedent that would result in all jobs on reservations being administered by the BIA or the tribes themselves. He said the current reality is the BIA doesn't have the capacity to do large-scale projects. He asked how do we consciously promote employment of an otherwise unemployed people when we have the opportunity to do so, at no extra cost to the state? How do we consciously help build a tribal community without an appropriation? These are the unspoken net returns. The people that would be employed would spend their money in nearby communities. We have a tendency to be really myopic. Do we have a directive to do it? No. Do we have the latitude to do it? Yes. I want to emphasize the opportunity we have here, because I think it's unique. We need to talk about all options, including apprenticeship programs. This is not a short-term fix.

Garrison said MDT has been working with the tribes through Vicky Koch and the civil rights bureau. They let the tribes know of upcoming opportunities and do a great job. The district administrators go through the Red Book process and report to the tribes as to what is coming up in their area in the foreseeable future. We also refer contractors who will be working on projects near reservations to the appropriate TERO offices and recommend their use as a resource for construction laborers.

Garrison said there are two opportunities coming up: one is a two-day seminar on Montana's tribes in Helena on September 8-9. Sarah Bond later elaborated on the training content. The second is an NHI course called Indians and Highway Construction, coordinated through FHWA.

Commissioner Reiter referred to his experience on the reservations as ranging from really good to really awful. He said you can't really understand one another until you do it in person; you don't learn it by sitting in a classroom.

Fuglevand raised the contractor's perspective: there is no recourse if the TERO office is not able to provide qualified personnel with specific training in the various disciplines of highway construction. We have lost a lot of time that way, because a lot of this training takes a long time to attain. We're all for working together. He suggested the contractors perhaps have the opportunity to have some input in framing the MOU to help them understand why things were set up a certain way.

Ringel said this is a good discussion. He voiced an opinion that things have not been going well in transportation. We also need to understand that we will be included in problems with other state agencies – we are part of "the state". This is an opportunity to start a dialogue and build trust.

Galt said a general statement that tribal relations across the state have slipped dramatically is a gross overstatement. There are some specific issues that keep hanging us up. One of these issues is cost. An "apples to apples" comparison of data would indicate there are instances where we have increased costs on certain reservations and not on others. Perhaps we are doing some things right on some reservations and not on others. We need to figure that out. Throughout the state, we have an issue with competition. Competition is less on reservation jobs. Less competition = higher prices. This is an issue that affects everyone in this state when it comes to stretching our resources to their maximum capacity. You will have the full support of the director's office and appropriate department staff within the reality of the changed of administration coming January 1, 2005. I would like to see FHWA at the table to help with this, given their role. Duman responded to say he would have someone there.

Garrison said he didn't want the commission to leave with the wrong idea. The Montana-Wyoming Leadership Council had a meeting during the WASHTO conference in Kalispell in July. It was unanimous among the reservation officials present that of all the state agencies they deal with, that MDT addressed their issues most of any of them, and wished the other state agencies would learn from MDT. Please don't get the idea that we are having major problems with the tribes; we are having some individual specific problems that do affect some individual specific projects.

Commissioner Howlett moved to create a subcommittee to address the following issues: identification of transportation related conflicts with tribes; collaboration and coordination with Federal Highways, Montana's Indian nation, the BIA, and other entities as appropriate. Their commitment will be to meet individually with each of Montana's Indian nations and to provide recommendations for policy consideration to the Montana commission before January 1, 2005. Commissioner Howlett would like to be part of the committee but didn't want to chair it. A representative from MCA, FHWA, Commissioner Rice, Commissioner Espy, Jim Currie and another director's office representative will sit on the committee. They will need to consider if there are any other stakeholders that should be invited to sit on the committee. The department will help facilitate the meetings.

Commissioner Espy seconded the motion. All five commissioners voted aye.

Commissioner Howlett moved to nominate Commissioner Rice as chairman; Chairman Anderson endorsed that but said the committee might want to vote on it.

Galt said he would like to have a letter out this week and asked Commissioner Howlett to assist in drafting the letter for the chairman's signatures and also to reach out to the tribal elders and assist Lorelle in setting up the meetings.

### **Engineers' estimate versus bid – Commissioner Rice**

Commissioner Rice said on average, our estimates are pretty close, but when there is a divergence in any one bid, there seems to be more of a variance, 20% in either direction. This caused me to question our estimates and how reliable they are. Also, how valuable and useful are they to us? How much does it cost us to do estimates? If we knew that they cost us say \$5 million, would we still do them? Galt said engineers' estimates are required by FHWA so, yes, we would. Rice asked are they worth it? Would we be better off taking that money and using it for something else?

Duman said the engineers' estimate is the basis for us to evaluate the bids we receive. Galt said we aren't out in the marketplace every day like the contractors are, but our staff is willing to make reasonable adjustments to the estimate once more information is brought to light. He said there are changing costs in materials, such as steel and water, and we need to be on our toes to keep up with the fluctuations in the market.

Chairman Anderson – with reduced competition, or only one bidder, how do we know they are in the ballpark? Commissioner Rice – we are missing some serious items in our estimates, for example, on a project in the Great Falls where we missed the fact that material would have to be hauled 50 miles.

Galt – we have refined our estimates and had a shift in philosophy where we don't pad the estimate like we used to.

### **Cost of traveling to remote locations**

Galt said we spent about \$800 in staff per diem to come to Baker. Commissioner Rice said we used multiple airplanes to get to Baker, and for good reason: it is simply too risky to put all that expertise in one or two planes.

### **Schedule**

The plan is to hold the Red Book strategizing session in October following the Polson commission meeting and the actual Red Book meetings in November. At the October meeting, we will need to talk about advance construction and what assumption we want to make for 2009 funding. Jim will work with Lorelle to get some potential dates for those meetings.

Commissioner Espy thanked Commissioner Rice for gathering commissioners together during WASHTO. There were several that told me that this was the best meeting of the sort they'd ever been to.

Galt apologized for the disruption during the meeting with he and Jim taking phone calls. We lost two employees today to a train up in the Chinook area.

The meeting adjourned at 2:45pm.

Shiell Chairman Anderson, Chairman  
Montana Transportation Commission

David A. Galt, Director  
Montana Department of Transportation

Lorelle Demont, Secretary  
Montana Transportation Commission